

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALVIN B. GOBBLE)	
Claimant)	
VS.)	
)	Docket No. 1,049,638
DURHAM SCHOOL SERVICE)	
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE)	
Insurance Carrier)	

ORDER

Claimant requested review of the April 15, 2013, Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on August 13, 2013.

APPEARANCES

Matthew L. Bretz, of Hutchinson, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At the oral argument before the Board, the parties stipulated claimant's average weekly wage with respondent was \$40.40.¹ The dispute remains regarding claimant's wages while working for J. R. Trucking.

ISSUES

The ALJ found claimant's average weekly wage to be to be \$359.20, a combination of \$34.67 (however, see below footnote) for the respondent and \$324.23 for J. R. Trucking/Logistics (J. R. Trucking), after determining claimant worked two part-time jobs

¹ A split of \$34.67 and \$46.12.

that were sufficiently similar to implicate K.S.A. 44-511. The ALJ found no merit in the respondent's contention that claimant failed to establish his wages with J. R. Trucking, and further found claimant met the foundation requirements by stating how he came to possess Claimant's Exhibit No. 1 to the regular hearing. The ALJ went on to find, by the narrowest of margins, that claimant sustained an injury to his right shoulder and awarded an 18 percent impairment to the right upper extremity at the level of the shoulder.

Claimant appeals, arguing he has proven he sustained accidental injury arising out of and in the course of his employment with respondent resulting in a 26 percent whole body impairment and an 87 percent permanent partial general (work) disability (100 percent wage loss and 74 percent task loss).

Respondent argues first that it did not stipulate to compensability as stated in the award. Respondent contends that if claimant had suffered an on the job injury he would have immediately sought medical treatment and not waited two weeks, as is the case here. Respondent also argues claimant failed to carry his burden of proof demonstrating earnings from J. R. Trucking, as a proper foundation was not laid regarding Claimant's Exhibit 1 to the regular hearing. Therefore, Exhibit No. 1 to the regular hearing should be excluded. Further, based on the only competent evidence before the Board, claimant's average weekly wage should be \$40.40, (see above stipulation) which would result in claimant having been overpaid temporary total disability compensation (TTD) in the amount of \$1,129.74. Finally, respondent argues, as above noted, that claimant is not entitled to any award of compensation. However, in the event the Board finds he is, the award should be limited to no more than a 6 percent functional impairment to the right upper extremity at the level of the shoulder.

Issues on Appeal

1. Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent?
2. If claimant did suffer a work-related accident, what is the nature and extent of his injuries and disability?
3. What is claimant's average gross weekly wage? Did claimant prove that his job with J. R. Trucking was the same or similar to his job with respondent thus allowing a combination of the average gross weekly wages from both under K.S.A. 44-511(b)(7)?
4. If the ALJ erred in combining the wages with both respondent and J. R. Trucking in calculating claimant's average weekly wage, was there an overpayment of TTD, and if so, how much?

FINDINGS OF FACT

Claimant began working for respondent part-time in 2005 as a bus driver. Claimant was earning close to \$13 an hour driving a bus. During the summer he would be paid a lower wage to clean buses, attend safety meetings and travel to schools to talk with principals, as part of an outreach program to get students signed up for busing. Claimant testified he worked 25 to 30 hours a week for respondent, Durham. However, respondent's records² indicate claimant worked only 2.3 hours the week of November 6, 2009, and a total of 10.15 hours during the two-week period from October 23, to November 5, 2009. The exhibit indicates, and claimant agreed on cross-examination, that he did not actually work even close to 25-30 hours per week during this time period.³

Claimant had a second job driving a compost truck, hauling summer grass full-time for Stutzman's Refuse. Claimant worked for Stutzman's from May to mid-November 2009. He was making \$11 an hour. Claimant received his last paycheck from Stutzman's the first of December. Claimant testified that three to four times a week he had to get out of the Stutzman truck to move 50 gallon containers so that the arm on the truck could pick them up to empty them. Claimant initially testified that the Stutzman job was seasonal. However, at his deposition on March 2, 2011, he acknowledged he had been terminated from the job after being involved in an accident with Stutzman's truck. Claimant was referred for an alcohol test after the accident, which he failed.⁴

Claimant testified he also worked part-time for two weeks in November 2009, for J. R. Trucking. He only worked for J. R. Trucking for that short time because of the fall he had while working for respondent. Claimant's job with J. R. Trucking involved driving a sealed-cargo truck from Hutchinson, Kansas to near the Colorado border. Claimant testified that he made close to \$15 an hour with J. R. Trucking. During his short employment with J. R. Trucking, claimant testified he worked a total of 48 hours.⁵

Claimant testified he last worked for J. R. Trucking before the accident. The exhibit showing claimant's earnings from J. R. Trucking was obtained from a co-worker named John [last name unknown] in December of 2009. The exhibit was mailed from John to claimant but the envelope was not retained by claimant. Claimant did not undergo a pre-employment physical or drug test before starting with J. R. Trucking. Claimant has been

² R.H. Trans., Resp. Ex. 1 at 1.

³ Alvin Gobble Discovery Depo. (May 13, 2010) at 27-28.

⁴ Alvin Gobble Depo. (March 2, 2011) at 31-32.

⁵ Claimant's Exhibit No.1 to the regular hearing which was admitted by the ALJ over respondent's objection, indicates claimant was earning \$11.55 per hour and worked a total of 60 hours for J. R. Trucking.

unable to provide any information identifying the location of J. R. Trucking. He could not remember when or where he picked up the trucks or where he would drop them off.

Claimant described his job with J. R. Trucking as a “leap frog operation” where he would pick up a truck, drive it to the Colorado border, trade trucks with another driver and return the new truck to Hutchinson, Kansas. Claimant terminated his employment with J. R. Trucking on November 18, 2009, the day after his fall from the bus. Claimant testified the pain from the fall was too great for him to continue driving the truck for J. R. Trucking.⁶ Claimant acknowledged the job for J. R. Trucking required no loading or unloading of the cargo, unlike the job with respondent, which, at times, required he assist with the loading and unloading of handicapped children. Additionally, claimant acknowledged entering and exiting the truck was more difficult than with the bus. Even though Claimant’s Exhibit No. 1 to the regular hearing shows an hourly wage, when asked at the regular hearing, claimant was unable to remember how he was paid by J. R. Trucking.

With the exception of Claimant’s Exhibit No. 1 to the regular hearing, there is no documentation in this record verifying the existence of J. R. Trucking. The parties stipulated into the record a document from the Kansas Secretary of State certifying that no information has been located verifying the existence of J. R. Trucking as either a domestic or foreign entity.

Claimant testified that on November 17, 2009, while at Durham, he fell down the steps of a bus after performing his post-operation duties. Claimant testified that the rubber on the steps may have been damp from moisture from rain the night before as the doors on the buses are always left open a little bit. Claimant testified that when he fell, he remembers reaching out and bending over slightly while grabbing the top of the rail. He believes he lost consciousness. When he woke up, he was lying on his left cheek with one of his legs in the air and the other underneath the edge of the bus. Claimant sat for a few minutes to collect himself and then got up and called his boss. He got no answer, went home and tried again later with no response. Claimant was finally able to contact his boss the next day to report the accident. There were no witnesses to this fall.

Claimant filled out an accident report on November 29, 2009, noting where it asked the nature of the injury, that he had suffered injury to his right arm and right shoulder with a date of accident on November 17, 2009. At the time, claimant did not mark down his neck, foot or back pain as he believed those areas would get better and there was not a lot of space on the form.⁷ However, on the form, the section requesting identification of the body part injured was left blank. Claimant testified that he put down the minimum to satisfy

⁶ P.H. Trans. (July 22, 2010) at 12-13.

⁷ Alvin Gobble Depo. (March 2, 2011), Resp. Ex. 1.

his supervisor. He was offered medical attention, but continued to work until the end of November when he finally sought medical treatment.

Claimant was sent to Dr. Larry Enszt, the company physician, on November 30, 2009. Dr. Enszt had also been claimant's family physician for years before transferring claimant's care to Dr. Karl Radke at the same medical center. Claimant initially sought treatment for right shoulder pain only.

Claimant has a history of being treated for fibromyalgia in 2003, with a pain level of 3 out of 10 at the time. He was taking over-the-counter NSAIDs for the pain. Claimant alleged that after the accident in November 2009, his pain increased and he was given prescription pain medication. He was told in 2005, that he had some arthritis in his low back. Claimant denies having any numbness or tingling in his arm or legs before the accident, but reported having numbness and tingling in his right thumb from a partial amputation injury while working for what was then Cessna in the mid 1970's. Claimant also reported that he had a prior work-related low back injury from 1978 while working for Phillips News.

Claimant acknowledged having pain all over his body before the accident because of his fibromyalgia, but testifying the accident made his pain worse. Claimant testified that his right shoulder problem, and neck stiffness are the result of the accident. He also feels that ringing in his ears is worse because of the accident. Claimant described left hip pain, right foot pain and lumps on the top of his right foot, all caused or aggravated by the accident on November 17, 2009.

Claimant acknowledges that his symptoms were aggravated in February 2010 after he fell in the snow at home. He met with Dr. Spitzer who ordered x-rays and told claimant he was okay. He was not working at the time of the regular hearing, but was still considered an employee of Durham.

Marilee Mayes, general manager for Durham School Services in Hutchinson, testified that claimant reported his accident shortly after it occurred. Claimant initially refused offered medical treatment. However, claimant came to Ms. Mayes on November 29, 2009, and requested treatment, and he was sent for treatment to the medical center in Hutchinson, Kansas. Ms. Mayes authored and mailed a letter to claimant dated May 2, 2012, offering restricted duty. They had, in the weeks prior to the letter, discussed claimant's limitations and what he thought he could and couldn't do in terms of working. Claimant was notified in the letter, of an accommodated position within his restrictions, but he never came in to discuss it. At the time of the July 22, 2010, preliminary hearing, Ms. Mayes was still willing to discuss a restricted duty position with claimant. She was willing to discuss a job which met the restrictions from Dr. Barrett the day before the preliminary hearing. Ms. Mayes did not remember talking to claimant after she mailed the May 2 letter.

When claimant met with Dr. Ensz in November 2009 his arms, shoulder and feet were examined. However, the medical records indicate claimant's complaints were limited to his right shoulder and neck. Claimant reported soreness and stiffness. Even though claimant had lumps on the top of his right foot, he failed initially to advise Dr. Ensz of the right foot complaints at the first examination. The first mention of foot or ankle problems was on December 23, 2009, when claimant called and told the doctor's office he had sprained his right ankle. Claimant testified that he was limping after the accident and within a day or two noticed bruising all over his body. Claimant testified that Dr. Ensz's focus was on the neck and the shoulder. He had an MRI of the right shoulder on December 15, 2009.

When claimant fell in 2009, he was initially treated for a shoulder injury. He alleges he later developed problems in his neck. His foot pain began five weeks after the accident, but he admits to having plantar fasciitis in his left foot before the accident. He denies any prior shoulder problems, but admits to prior neck and back problems. Claimant also had arthritis in his left hip, joints and spine. He was seeing a rheumatologist for injections and testified:

Q. Did the rheumatologist diagnose you with rheumatoid arthritis?

A. I have a note, she said arthritis, I don't remember the word rheumatoid.

Q. Is that why your condition's getting worse, you think, because you have arthritis?

A. Well, that change in gait because of lack of use of my right foot, just many things.

Q. So maybe the problems are in your low back and in your left hip?

A. And my neck. It affects the neck, it affects my right arm. These two fingers are numb. The numbness goes down this arm (indicating). I have shooting electrical pain once an hour, maybe once every two hours, maybe once every four hours, but I have it quite often coming from the neck.

And then initially when I was hurt, you know, body pain, which I reported was the most severe in that right shoulder, and then as the time progressed, the pain just kinda changed and more things came up as time went on.⁸

Concern has been raised regarding claimant's use of prescription pain medication. On August 4, 2010, he received a 14 day supply of Hydrocodone from Dr. Barrett. On August 13, he received a 30 day supply of Hydrocodone from Dr. Nguyen, which claimant alleges was back dated by the doctor. On September 10, 2010, claimant received another 14 day prescription from Dr. Barrett and on September 15, another 30 day prescription of

⁸ P.H. Trans. (April 25, 2012) at 25.

Hydrocodone, Morphine and Morphine extended release from Dr. Nguyen.⁹ Claimant denies taking more than the prescribed pain medication. However, claimant was unable to recall if he advised either Dr. Barrett or Dr. Nguyen that the other was providing him with pain medication.

Claimant no longer has his commercial driver's license due to his need for narcotic pain medication. Claimant has not worked steadily since the accident. He did become a licensed minister and has married one couple, earning \$50 in June 2011.

Claimant continues to have numerous problems with his foot, back, neck, right arm, shoulder, and left hip, with ongoing headaches. He has been receiving assistance for two years for 20 hours a week with cooking, cleaning, transportation, etc. Claimant acknowledged driving himself to the regular hearing.¹⁰ Claimant also has a prescription for a scooter due to his diagnosed spinal stenosis and continuing weakness.

Claimant admits to left shoulder problems in 1997, neck pain in 1998, and right shoulder problems in 1999. Claimant fell off the steps of his house in 2003 and landed on his left shoulder, causing him pain. At that time, he had x-rays and an MRI of the left shoulder. Claimant also reported developing pain in his feet, especially the left one in 2003. Prior to the accident with respondent, claimant had received treatment for fibromyalgia and plantar fasciitis. Dr. Ensz had earlier assigned claimant a restriction of sitting every two hours.

When claimant first sought medical treatment from Dr. Ensz, he was prescribed nonsteroidal anti-inflammatory drugs, underwent x-rays, which were read as negative for acute fractures and had limited complaints to the right shoulder and neck. A right shoulder MRI on December 15, 2009, indicated a mild-to-moderate partial undersurface tear of the supraspinatus with degenerative changes in the AC joint leading to impingement. The right shoulder rotator cuff changes were felt to be primarily age-related degenerative changes.

When claimant reported right ankle complaints for the first time on December 23, 2009, he was referred to Erik Severud, M.D. In his first report from January 14, 2010, Dr. Severud noted right shoulder pain and right ankle pain suggestive of cervical radiculopathy. A cervical MRI on January 18, 2010, showed multilevel degenerative disc changes with a right foraminal disc protrusion at C5-6 and C6-7 with narrowing in the right neural foramen at C6-7. Dr. Severud performed a corticosteroid injection into the right shoulder and ordered physical therapy, neither of which provided significant improvement.

⁹ P.H. Trans. (April 25, 2012) at 27-29.

¹⁰ R.H. Trans. at 20.

Claimant was referred to John Estivo, D.O., for an examination on February 22, 2010. Dr. Estivo felt there were herniated discs at C5-6 and C6-7, which he believed were the source of claimant's right shoulder and arm pain, numbness and tingling. He reported evidence of symptom magnification, particularly with the right shoulder complaints. He felt further diagnostic testing should be done for the right foot and ankle. A referral to a foot and ankle specialist, Dr. Heady, resulted in a finding of a right tarsal navicular bone fracture which was felt to be subacute to chronic. There were findings suggestive of avascular necrosis and osteonecrosis of the right navicular in the ankle.

Claimant met with physical medicine specialist Sandra Barrett, M.D., beginning on May 10, 2010, with complaints of pain in his neck, right shoulder and right foot. Claimant's history of injury indicated swelling of both legs and discoloration. Claimant described his ankle pain as constant. He reported problems lifting and difficulty raising his hand to his mouth, and numbness into the fingers and palm. Claimant denied any prior injury to the shoulder, neck or ankle, but admitted to a history of fibromyalgia. Dr. Barrett examined claimant and opined he had cervical neck pain with a reported herniated disc and degenerative disc disease, right shoulder pain with concern of supraspinatus tendon, and right foot pain. Dr. Barrett recommended claimant have an MRI of the neck and shoulder and right foot, and an EMG of the right upper extremity. She also recommended physical therapy and injections for the shoulder and/or cervical spine. Dr. Barrett opined that, within a reasonable degree of medical probability, claimant's ankle injury is related to the injury on November 17, 2009. Claimant advised Dr. Barrett that he was working three jobs at the time of the accident, with respondent, J. R. Trucking and with Stutzman driving the trash truck.

Claimant underwent nerve studies on June 8, 2010, showing cervical radiculopathy on the right at C6-C7. Dr. Barrett found evidence of isolated compressive neuropathy involving the median, radial, and ulnar nerves peripheral neuropathy or myopathy. Dr. Barrett recommended claimant undergo physical therapy for the shoulder and the neck, traction/decompression for the cervical spine, steroid injections for the shoulder and cervical spine and continued use of a CAM walker for the right ankle.

Claimant met with Dr. Barrett on July 21, 2010, for follow-up of his right ankle pain and neck pain. Claimant's cervical spine showed tenderness through the paraspinals and guarding, but he complained more about his foot, which showed mild swelling and tenderness over the right foot. He had reduced active range of motion due to protective maneuvers. Dr. Barrett found claimant to have cervical radiculopathy with disc protrusion, failing to respond to therapy, and foot pain with an MRI suggestive of vascular necrosis or osteonecrosis. Dr. Barrett decided to discontinue physical therapy as it was not providing claimant with any continued benefit.

Claimant met with Dr. Barrett on September 30, 2010, for follow-up, at which time it was noted claimant had no improvement after two injections. Claimant also had problems with the navicular bone in his right foot and had been referred to Dr. Heady.

Since conservative treatment was not working for claimant, Dr. Barrett recommended medication to optimize claimant's pain control or a surgical referral.

Claimant met with Raymond Grundmeyer, III, M.D., a board certified neurosurgeon, on December 17, 2010. Claimant complained of neck pain that caused headaches. Dr. Grundmeyer found nothing grossly abnormal during a general physical exam, but did note claimant had left-sided weakness from the shoulder to the hand or to the digits during the neurologic exam. Based on the radiographic studies, Dr. Grundmeyer recommended claimant have an anterior cervical discectomy and fusion at C5-6 and C6-7. This procedure was recommended because Dr. Grundmeyer believed it would likely improve claimant's condition.

Dr. Grundmeyer opined that claimant's degenerative disc disease at C5-6 and C6-7 preexisted claimant's November 17, 2009, injury.¹¹ He also opined that the right foraminal narrowing, moderate to severe, preexisted the November 2009 injury. He opined that many people have those types of degenerative changes, but many won't have symptoms and can tolerate things gradually over time. They then have some type of event, whether trauma, fall or accident and begin to have symptoms, so that even though the anatomy was somewhat degenerative in nature, an acute event caused the symptoms to start.¹² He testified that the accident didn't cause the degenerative changes, but those changes may not have been symptomatic until the accident.¹³ An anterior cervical discectomy and fusion at both C5-6 and C6-7 were recommended. Claimant was advised to contact Dr. Grundmeyer's office to schedule the recommended surgery, but claimant never followed up on the recommended treatment.

Claimant met with Chris Fevurly, M.D., at respondent's request for an examination, on November 19, 2010. Claimant had complaints of right foot and ankle pain, aggravated by prolonged standing and walking. Claimant also reported right shoulder and right arm pain, aggravated by attempted movement of the right shoulder, numbness in the first, second and third fingers, persistent cervical pain after attempted movement of the neck and frequent headaches. Claimant reported being dependent on a cane for the last 9 months because his right foot was giving out on him, and making him only able to walk for 10 to 15 minutes nonstop.

Claimant was unemployed due to the injury of November 17, 2009, but gave Dr. Fevurly a work history with respondent for five years prior to the injury, work for Stutzman from May 2009 to the end of October 2009 and two weeks working for J. R. Trucking

¹¹ Grundmeyer Depo. at 16-17.

¹² Grundmeyer Depo. at 17.

¹³ Grundmeyer Depo. at 18.

leading up to the date of accident. Claimant denied any work-related accidents or injuries with either employer other than respondent.

Claimant was examined by Dr. Fevurly, who opined claimant had right ankle navicular fracture osteonecrosis, subacute versus chronic, with preexisting history of right foot pain secondary to plantar fasciitis in 2003, but no mention of right foot and ankle pain to the doctors until five weeks after the November 17, 2009, event; right shoulder rotator cuff tendinopathy with diminished range of motion, findings consistent with impingement, a 2009 MRI revealed a partial thickness tear of the supraspinatus. There was multilevel degenerative disc disease in the cervical spine, a disc protrusion at C5-6 and C6-7, with an EMG showing acute C6 radiculopathy. This may contribute to the current right shoulder and arm tingling and numbness. Claimant had a preexisting history of chronic generalized pain complaints since at least 2003, preexisting fibromyalgia, neck, midback and low back pain, a history of recent psychosis and major depressive disorder, allegedly improved with medication. A prior evaluation indicated there was evidence of symptom magnification and malingering.

Dr. Fevurly found it unclear how claimant's conditions related to the work event of November 17, 2009. He opined it is probable those conditions are all degenerative and/or preexisting in nature. He found the conditions have no probable causal relationship to the November 17, 2009, work event and found it impossible to accord an acute fracture or significant worsening in the right navicular when there was no complaint of right foot and ankle pain until more than 5 weeks after the event. Dr. Fevurly found it more likely that claimant has developed chronic avascular necrosis of the bone over many years, which has been a contributor to his well documented chronic bilateral foot pain.

Dr. Fevurly went on to opine that the right shoulder and cervical spine changes are degenerative in nature and are a natural consequence of living and aging. The cervical radiculopathy resulted from degenerative disc and bone spondylosis leading to neural foraminal stenosis. The neck and shoulder discomfort was found to be fibromyalgia syndrome. He did not feel that the need for surgery on the ankle or right shoulder were causally related to the November 2009 injury. Dr. Fevurly opined claimant would continue to have problems with his foot, shoulder and neck until he had surgery.

Dr. Fevurly reported claimant denied prior neck, midback and low back problems but this was in conflict with an earlier diagnosis of fibromyalgia syndrome. An August 22, 2003, report from Dr. Ernesto Levy, a rheumatologist, documented claimant's many-year history of muscle pain in different areas of his body, including the upper back, low back and extremities. Claimant acknowledged the fibromyalgia would wax and wane over the years. Claimant told Dr. Fevurly the fibromyalgia was worse since the work-related accident. Claimant reported to Dr. Fevurly that, after the accident, he developed psychosis and started seeing and hearing things that were not there. Dr. Fevurly noted the evaluation by licensed psychologist, T. A. Moeller, M.D., who reported findings consistent with frank

malinger. Dr. Moeller also reported possible major depression and the existence of a previous diagnosis of major depression.

The diagnoses reached by Dr. Fevurly had no probable causal relationship to the accident on November 17, 2009. They were degenerative in nature or could not be connected due to the lapse in time in reporting the complaints.

Dr. Fevurly found claimant capable of performing his bus driver duties with his current functional abilities as long as he was not on any opiate pain medication. He cautioned that there was no guarantee claimant would not suffer an additional injury. Dr. Fevurly reviewed the task list of Steve Benjamin and opined claimant could no longer perform 35 out of 63 non-duplicated tasks for a 56 percent task loss. He noted that the limitations claimant has are for his preexisting conditions. He felt claimant had a 0 percent task loss for the alleged work-related injury.

Claimant met with board certified internal medicine specialist Baoluan Nguyen, M.D., on August 13, 2010, at the Hutchinson Clinic, to establish care. Dr. Nguyen was given a history of claimant falling down stairs in November 2009 resulting in multiple complaints. Claimant was having some of his complaints handled by a workers compensation treater. He had multiple problems, reporting right foot pain from a fracture, migraine headaches and neck pain. He was also reporting left hip pain and lower back pain which Dr. Nguyen indicated was new. He was not walking at the time of this examination because of right foot pain and was utilizing a scooter. He also had some dental problems that needed to be taken care of before he could receive treatment for his other physical problems.

Dr. Nguyen examined claimant and found the following problems: tooth abscess, tinnitus, migraine headaches, night sweats, left hip pain, lower back pain, hypertension, gastroesophageal reflux disease, depression, and obesity class two. He made the following recommendations: amoxicillin for the tooth; ENT evaluation for the tinnitus; medication for the migraine headaches; TB skin test for the night sweats; x-rays and pain medication for of the left hip and low back; continuation of medication for hypertension; change in medication for the gastroesophageal reflux disease; and continuation of the medication for depression. He did not make any recommendations for the neck or right foot pain as claimant was dealing with workers compensation physicians for those issues.

Claimant met with Dr. Nguyen for follow-up on September 15, 2010. Claimant continued to have problems, but the recommended treatment seemed to be helping. Dr. Nguyen diagnosed chronic lower back pain due to a herniated disk which he indicated was from C6-C7 and stenosis, night sweats, migraine headaches, left hip pain, obesity class 2, gastroesophageal reflux disease, hypertension, and depression. Dr. Nguyen noted claimant was on Morphine 30 mg, every 12 hours and Lortab 10/500 every six hours. Dr. Nguyen also started claimant on Topamax at the last visit for migraines. He made the following recommendations: increase in pain medication for chronic pain from herniated

disk with Morphine sulfate going to 45 mg every 12 hours and Lortab changing to 10/325 every six hours, and claimant was instructed to see the workers compensation doctors, obtain a TB test for the night sweats and continue the Topamax for the migraines. Claimant was given a referral to Dr. Naveed for the hip pain, encouraged to diet and exercise for the obesity, remain on the same medication for the hypertension which has been well controlled and see Dr. Tan for the depression.

Claimant met with Dr. Nguyen again for follow-up on November 15, 2010. Claimant continued to have chronic pain from the herniated disk at C6-C7 and now a bulging disk at L5-S1. His pain was improved enough that he wanted to do more by way of treatment, he was less depressed and his headaches were better controlled. Dr. Nguyen diagnosed chronic lower back pain, chronic neck pain, migraine headaches, gastroesophageal reflux disease, hypertension and depression. He recommended claimant continue with the prescribed medication.

Claimant met with Dr. Nguyen again for follow-up for pain management on January 17, 2011. Claimant continued to have chronic pain and was instructed to continue with medication. Claimant continued to see Dr. Nguyen for several more visits. Claimant continued on a multitude of pain medications, including, at various times, Cymbalta for fibromyalgia, Lortab, Morphine, Topamax, Relpax for headaches, MS Contin, Lyrica, Midol, OxyContin, Norco, Hydrocodone and Oxycodone. At the August 5, 2011, examination, Dr. Nguyen noted pain medicine refills were refused, with the precaution that the refills would be provided when it was time. Dr. Nguyen acknowledged that he was able to instruct claimant on the proper doses of medication, but could not guarantee claimant was following his instructions. No blood testing was ever performed to ensure claimant was not abusing the medications, even though tests were available.

Claimant returned to Dr. Nguyen on January 5, 2012, with increased pain complaints. Claimant was diagnosed with fibromyalgia as well as his prior physical problems. Claimant was placed on Oxycodone every four hours, Norco every six hours and told to return in two months or earlier as needed. However, claimant returned to Dr. Nguyen on January 24, 2012, after having fallen on ice and experiencing increased back pain with radiating pain bilaterally, nausea and vomiting for three days. Claimant was continued on his pain medication regime and, for the first time, Dr. Nguyen ordered a scooter for claimant, due to his tendency to fall. Pain medication refill requests on January 24, 2012, were refused to claimant.

Claimant met with Chris Lothes, M.D., on January 27, 2012, regarding low back pain. Dr. Lothes works with Dr. Grundmeyer at Abay Neurosurgery. There was no evidence that claimant had any complaints of cervical spine, shoulder, arm or hand pain at that time. In Dr. Grundmeyer's opinion this indicated that, as of the date of the examination, claimant's symptoms relative to his cervical spine had resolved. Dr. Lothes recommendations on January 31, 2012, dealt with claimant's lumbar spine only.

Claimant was next seen by Dr. Nguyen, on April 6, 2012, with ongoing low back pain and foot pain. There was no mention of claimant's prior neck pain at this visit. Possible surgery for the low back pain was discussed, with a referral to a surgeon documented.

Claimant was last seen by Dr. Nguyen on August 10, 2012. He continued to have low back pain, right foot pain and chronic cervicgia from the herniated disk. He continued to have difficulty getting around. There was no evidence that claimant was malingering. Dr. Nguyen continued to diagnose claimant with low back pain due to a herniated disk, right foot pain and neck pain due to injuries suffered on the job in November 2009. Dr. Nguyen testified that claimant's spinal stenosis of the lower back caused claimant to fall on more than one occasion as stenosis can cause weakness in the legs. The multiple falls in turn caused claimant's other symptoms to worsen. Claimant's pain medication regime continued, but with Oxycodone substituted for the Morphine. Dr. Nguyen was unaware that claimant was being treated by Dr. Barrett, a pain management physiatrist in Wichita, Kansas. Dr. Nguyen was unable to explain why, if he prescribed claimant Hydrocodone and Morphine for thirty days on August 13, 2010, Dr. Barrett would then prescribe Hydrocodone four days later for fourteen days. Dr. Nguyen's records contain no reference to Dr. Barrett.

Claimant met with licensed psychologist T. A. (Theodore) Moeller, Ph.D., on July 28, 2010, and August 18, 2010, for a psychological evaluation. Dr. Moeller testified that claimant was referred to him by Dr. Barrett, who was concerned claimant may be depressed due to his symptoms and also to help determine the veracity of claimant's symptoms. As part of the evaluation process, Dr. Moeller was provided certain medical and psychological records which are listed on page four of his September 24, 2010, report. He also had the opportunity to talk with Dr. Jeremy Tan, a psychiatrist, and Mrs. Kathleen Flynn, LMLP, a line therapist, both staff members at Horizons Mental Health Center, and was provided a copy of claimant's deposition, which he reviewed.

During his initial meeting with claimant, Dr. Moeller noticed inconsistencies in claimant's complaints versus his physical appearance. Dr. Moeller regularly observes patients walk in hallways and down stairs in order to observe their physical actions. Claimant's use of a single-point cane and weight bearing was not consistent with someone who needed a cane. Claimant walked farther than he had specified he could during their conversations. Additionally, claimant walked down a flight of stairs rather than take the elevator, a painful activity for someone with claimant's problems.

Claimant was asked to undergo a multitude of tests intended to establish the veracity of the self-reported problems and to identify possible malingering. The baseline for work-related injuries is that 28-32 percent of people will exaggerate their symptoms for secondary gain purposes. The test results indicated claimant was malingering, over-reporting his symptoms and presenting himself as more impaired than he actually was. One test, the Structured Interview of Malingered Symptoms or S-I-M-S, is used to determine the probability that an individual is representing his or her experience and

symptoms accurately and validly or whether there is conscious exaggeration. Any score above 14 indicates malingering, which Dr. Moeller stated was conscious versus unconscious exaggeration. Claimant's score was 35, one of the highest Dr. Moeller had ever seen over the last several years.

Dr. Moeller issued his report on September 24, 2010, opining that there is no reliable data indicating claimant has experienced psychological injuries either caused or exacerbated by the work-related injury of November 2009. He felt the appropriate diagnosis was malingering. Dr. Moeller felt claimant was attempting to over-report things and present himself as more impaired than he actually was. He indicated that claimant appeared more capable of weight-bearing activities than he claimed. He went on to say that this opinion in no way impugns the assessments of the other physicians that have been treating claimant. He also stated that since claimant's claims of psychological impairment are likely overstated, there may be some question as to the extent and veracity of claimant's claims of physical impairment as well.

Claimant met with board certified neurological surgeon, Paul S. Stein, M.D., for a court ordered independent medical examination (IME) on March 21, 2011. Claimant reported multiple complaints subsequent to his November 17, 2009, work incident. Claimant denied any prior history of symptoms affecting the low back, right foot, right shoulder, neck, left hip, or any history of headaches. He did report a work-related accident 30 years ago with no significant injury and another resulting in a partial right thumb amputation. However, medical reports from 2003 indicated a multi-year history of muscle pain including the upper back, lower back and extremity pain. Claimant was diagnosed with gout, fibromyalgia compounded by depression, stress and sleep deprivation. He was also treated for plantar fasciitis. A DOT physical done on April 25, 2008, indicated a history of low back pain, fibromyalgia and plantar fasciitis.

Claimant reported to Dr. Stein that at the time of the fall, he had pain in his right shoulder, stiffness in his neck and tingling in his left lower extremity. Medical records from November 30, 2009, indicated a fall on November 17, 2009, with initial complaints to the right shoulder only. Claimant failed to seek medical treatment until November 30, 2009. The first mention of a right ankle problem was on December 23, 2009, when x-rays of the ankle were reported as negative.

Claimant also told Dr. Stein he began to have headaches immediately after the fall, although the medical records do not support this statement. At the time of the examination, claimant was having about three headaches a week with the severe ones lasting about four hours at a time. The headaches seemed to accompany any type of physical activity, started in the occiput and extended to the rest of claimant's head. Once a week, the headaches caused nausea and vomiting. Claimant reported that he must go into a dark room and close his eyes to help alleviate the headaches. Claimant's pain with the headaches are an 8 or 9 out of 10.

Claimant reported that his right arm and shoulder pain is present at rest and increases with the use of the right upper extremity. He indicated extension of the right arm caused the most pain at a 4 to 6 out of 10. Claimant's neck pain seemed to be connected to the shoulder and arm discomfort with the right side hurting more than the left. Moving the head in any direction aggravated the pain. His pain level for the neck was 5 to 9 out of 10. Claimant's low back pain, which he told Dr. Stein began at the time of the accident, is a 4 or 5 out of 10. His left hip pain extended from the buttocks to the back of the left thigh and the pain level was a 2 to 4 out of 10. Claimant reported that his left foot pain had resolved, but he continued to have pain in his right foot. He reported pain in the right foot at rest and with weight-bearing. His pain level in the right foot was a 7 to 10 out of 10. Claimant also reported numbness and tingling in his right arm and hand and down the back of the left thigh and in the right foot.

Dr. Stein completed an examination and noted claimant was walking with a cane and had a rather marked right-sided limp, and appeared to walk on his heels or toes. He noted claimant reported persistent severe symptomatology in many areas of the body which claimant related to the November 17, 2009, accident. Additionally, claimant's pattern of symptomatology made it difficult for Dr. Stein to accept claimant's report that all of his symptoms occurred at the time or shortly after the alleged accident. Dr. Stein noted the medical records showed that the bulk of claimant's complaints weren't reported until December 23, 2009. Dr. Stein also noted that claimant underwent psychological testing with Dr. Moeller, which indicated evidence of malingering. This confirmed Dr. Stein's impression that there was symptom magnification, conscious or subconscious.

Dr. Stein opined that the pathology in the neck and shoulder is degenerative and not infrequently seen in individuals with minimal or no symptomatology. Given the symptom magnification, it is impossible to state clearly that those degenerative changes are related to the work incident or are even symptomatic. Dr. Stein could not state with any reasonable degree of medical probability that claimant sustained a permanent injury in November 2009.

Claimant met with Dr. Stein again on April 24, 2012. Claimant presented in a wheelchair and reported that he had a motorized wheelchair at home. Claimant reported his symptoms were getting worse and he complained of pain in his neck, lower back, right arm, right hand, left hip and right foot. Claimant reported that the neck pain is constant and has been present since the beginning and radiates into the arms, greater on the right and all the way down the arm into the hand. Extensive movement of the head or the neck causes pain into the right upper extremity. Claimant's pain level was a 6 to 9 out of 10.

Claimant reported that his left hip pain felt like it was in the joint and bothers him at rest after sitting for a while and with weight-bearing. Claimant's pain ranges from a 6 to 8 out of 10. Claimant was told by a rheumatologist that injections would not help. A fusion with grafting was recommended for the right foot. Claimant reported that his low back pain went into the left lower extremity and radiated posteriorly into the thigh and down to the

knee. His pain was intermittent and ranged from a 7 to 9 out of 10 on the pain scale. Claimant's pain limited his ability to walk.

Dr. Stein examined claimant again and concluded that his opinion had not changed from March 21, 2011. He noted some degenerative pathology, but there was significant overlay to the point he could not determine how much of claimant's complaints are physical and related to the accident and how much is symptom magnification. Because of this, Dr. Stein was not prepared to provide a functional impairment or work restrictions other than to opine that claimant is not nearly as impaired as he thinks.

Dr. Stein felt claimant was being prescribed too many controlled substances by too many doctors. Dr. Stein was not willing to make a statement regarding the task list of Steve Benjamin because he didn't go through the list since he had not assigned any restrictions to the claimant. He opined that, excluding any orthopedic problems, from a neurological point of view, there were no objective findings to indicate that claimant could not be employed.

At the request of his attorney, claimant met with board certified physical medicine and rehabilitation specialist, George G. Flutter, M.D., for an examination on January 10, 2012. Claimant reported pain affecting his head, neck, upper back, lower back, right shoulder, right upper extremity, left hip, and right foot. Claimant rated his pain at a 7 out of 10, with the level differing with each area. Changes in weather and physical activity make the pain worse. Claimant also reported numbness in his right hand, right arm, left leg and right leg, and some weakness in the right arm, right hand and left thigh.

Claimant was examined and Dr. Flutter assessed the following: status post work-related injury 11/17/09; neck/upper back pain; cervicothoracic strain/sprain; multilevel cervical discopathy; right upper extremity C6-7 radiculopathy; right shoulder pain/impingement/tendinitis/bursitis; left hip pain; probable left trochanteric bursitis; right foot/ankle pain; and fracture/necrosis of the right navicular bone. Dr. Flutter opined that based on the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between the conditions affecting claimant's neck, right shoulder, and right arm and the reported injury of November 17, 2009.

Dr. Flutter also opined that there was no clear evidence available in the medical records that claimant had cervical radiculopathy or right shoulder impingement. There are records that predate the injury of November 17, 2009, that indicate claimant has been diagnosed with fibromyalgia, neck pain, back pain, left shoulder pain, foot pain, and bilateral plantar fasciitis.

Dr. Flutter rated claimant with a 15 percent permanent partial impairment to the body as a whole for right-sided C6-7 radiculopathy of the cervicothoracic spine; 18 percent permanent partial impairment to the right upper extremity at the shoulder for range of motion deficits; 7 percent permanent partial impairment to the body as a whole for chronic

trochanteric bursitis with abnormal gait. Using the combined values chart, Dr. Fluter found claimant has a 26 percent permanent partial impairment. Dr. Fluter also opined that if the right foot is considered, claimant would have a 15 percent permanent partial impairment to the right lower extremity at the ankle for moderate range of motion deficits. He was not sure, based on the information available, whether the foot was truly related to the November 2009 injury. He agreed that if a person fractured his foot, he would expect the pain to have developed fairly immediately after the accident. Dr. Fluter also acknowledged that the left hip trochanteric bursitis resulted from the right foot. If the right foot was not injured on the date of accident, then he could not say that the hip problem stemmed from the accident either.

Dr. Fluter went on to assign the following restrictions to claimant: lifting, carrying, pushing or pulling up to 10 pounds occasionally and negligible weight frequently; avoid holding the head and neck in awkward and/or extreme positions; restrict overhead activities to an occasional basis; restrict activities at or above shoulder level using the right arm to an occasional basis; restrict activities greater than 24 inches away from the body using the right arm to an occasional basis; restrict stair climbing to an occasional basis; avoid squatting, kneeling, crawling and ladder climbing; avoid prolonged standing and walking, with allowance made to alternate activities and change positions as needed for comfort. He recommended a straight cane be used as needed as a gait aid, with walking restricted to 20 minutes every hour.

Dr. Fluter opined that, given the nature of claimant's orthopedic conditions and impairments, future medical care is likely. He also opined claimant would need ongoing pain medication to modulate chronic pain. Claimant might also need to consider surgical treatment of the cervical spine to address radiculopathy and of the right foot/ankle to address the navicular non-union.

Dr. Fluter reviewed the task list of Dr. Barnett and found that out of 44 tasks, claimant could no longer perform 35 for an 80 percent task loss.

Claimant met with Robert Barnett, Ph.D., a clinical psychologist, via telephone, for an evaluation, on May 24, 2012. Dr. Barnett opined claimant's average weekly wage at the time of the injury was \$600. This was based upon information from claimant that he was earning \$15.00 per hour and working full-time for Durham School Services. Claimant's wage loss was 100 percent at the time of the interview, as he was not working. Dr. Barnett also prepared a task list with all of claimant's prior employments over the previous 15 years. The list, marked as deposition Exhibit No. 3, failed to list J. R. Trucking as a past employer. Dr. Barnett also had a printout from the Social Security Administration listing claimant's employment history. This list, marked as Exhibit No. 5, also failed to list J. R. Trucking as one of claimant's previous employers. Claimant failed to mention his job at J. R. Trucking during his first meeting the Dr. Barnett.

Based on the restrictions of Dr. Fluter, Dr. Barnett found claimant to be unable to perform 36 of the 44 tasks he identified, for a 92 percent task loss.¹⁴ When the task loss was combined with claimant's 100 percent wage loss, claimant had a 96 percent work disability.¹⁵

Dr. Barnett's deposition was continued to October 26, 2012, in order to clarify items in the exhibits from the original deposition. After the original deposition, Dr. Barnett met with claimant to clarify his employment history. Claimant provided a task list from a job with J. R. Trucking. Dr. Barnett received the "JR Trucking logistics, payroll advisory November 1st of 2009 to November 29th of 2009" fax from claimant's attorney, Mr. Bretz. In Dr. Barnett's opinion, the tasks that claimant performed for respondent, Durham, are the same as those he performed for J. R. Trucking.

Claimant was interviewed, via telephone, for a vocational assessment by Steve Benjamin on September 4, 2012. Claimant reported that in the last 15 years he has held 15 different jobs. He was not employed in 2008, 2004, 2003 or 2002. Claimant reported that he continued to work his regular job with respondent from the date of the injury to his last day of work, which was a week after the injury.

Mr. Benjamin identified 62 tasks and, based upon the restrictions of Dr. Fluter, felt claimant could no longer perform 44 tasks for a 71 percent task loss. He went on to state that claimant's wage loss was 100 percent, as he was not working. When claimant was working, his average weekly wage was reported to be \$359.20. Mr. Benjamin felt that claimant should be able to return to the open labor market earning \$456.80 based on a 40 hour work week. This would not constitute a wage loss for claimant. Claimant would be limited to sedentary type work.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states:

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

¹⁴ Actually calculates to 82 percent.

¹⁵ Actually calculates to 91 percent.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.¹⁶

The Board must first determine whether claimant suffered personal injury by accident on the date alleged. Claimant alleges an accident on November 17, 2009. Certain medical records indicate a date of accident on December 5, 2009. However, this date appears more related to actual medical treatment rather than an accident. Claimant's testimony verifies that he suffered the fall on November 17, 2009. There is no contradictory information in this record to this date. The Board finds claimant suffered personal injury by accident on the November 17, 2009, date as alleged. Additionally, Ms. Mayes verified that claimant contacted her about the accident shortly after it occurred.

K.S.A. 2009 Supp. 44-511(b)(7) states:

(7) The average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross weekly wage of such employee paid by all the employers in such multiple employment. The total average gross weekly wage of such employee shall be the total amount of the individual average gross weekly wage determinations under this section for each individual employment of such multiple employment.

The Board must next determine claimant's average gross weekly wage on the date of accident. Claimant contends, and the ALJ agreed, that claimant's jobs with respondent and J. R. Trucking were the same or similar to the point the wages from both should be combined in this instance. However, respondent objects to the inclusion of any wages from J. R. Trucking, contending claimant never actually worked for this entity. The record supporting claimant's alleged job with J. R. Trucking is sparse. The only document with any wage history from J. R. Trucking is Claimant's Exhibit No. 1 to the regular hearing. This exhibit lists J. R. Trucking/Logistics but provides no address, telephone number, employer ID number, contact person or any other information which could be used to contact this alleged company. Additionally, the Kansas Secretary of State was unable to verify the existence of J. R. Trucking as either a domestic or foreign entity. Claimant's vocational expert, Dr. Barnett obtained a printout from the Social Security Administration listing claimant's past employment history. There is no record of J. R. Trucking paying any social security taxes on claimant's behalf. Finally, when claimant first met with Dr. Barnett, he failed to mention J. R. Trucking as a past employer.

When claimant offered Exhibit No. 1 to the regular hearing, respondent objected based upon a lack of proper foundation. The ALJ allowed the exhibit into the record, noting respondent's objection was more to the weight to be given to the exhibit rather than

¹⁶ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

its admissibility. The Board finds the determination by the ALJ to be in error. The foundation provided for Claimant's Exhibit No. 1 to the regular hearing was practically non-existent. Claimant had no contact information for the company, no telephone number, no address, no tax ID number, no employer representative name or any information which could be used to identify and locate J. R. Trucking. Additionally, neither the Kansas Secretary of State nor the Social Security Administration has been able to verify its existence. If the Board reverses the admission of this record, then claimant has no evidence to support its existence or to verify what wage he may have earned with that company. In the alternative, if the Board allows this exhibit into the record, the weight to be given to it would be zero. Claimant has failed to prove that J. R. Trucking ever existed or that he ever worked for the company. Claimant's wage in this matter is limited to his employment with respondent, at the agreed weekly rate of \$40.40.

K.S.A. 2000 Furse 44-503a states:

Whenever an employee is engaged in multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two (2) or more employers, and such employee sustains an injury by accident which arose out of and in the course of the multiple employment with all such employers, and which did not clearly arise out of and in the course of employment with any particular employer, all such employers shall be liable to pay a proportionate amount of the compensation payable under the workmen's compensation act as follows: Each such employer shall be liable for such proportion of the total amount of compensation which is required to be paid by all such employers, as the average gross weekly wages paid to the employee by such employer, bears to the total average gross weekly wages paid to the employee by all such employers, determined as provided in subsection (b) (7) of K.S.A. 44-511, as amended.

The Board further finds claimant's accident clearly arose out of and in the course of his employment with respondent. Therefore, there is no justification, under the above statute, to combine the average gross weekly wage from J. R. Trucking, even if its existence could be verified.

K.S.A. 2000 Furse 44-510c(b)(2) states:

(2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

Claimant was paid 5.68 weeks of TTD at the rate of \$239.48 per week, totaling \$1,359.21. The statute limits the weekly benefit to 66 2/3 percent of claimant's average gross weekly wage, but no less than \$25.00 per week. Based upon the above average gross weekly wage determination, claimant is entitled to \$26.93 per week for 5.68 weeks in the amount of \$152.96. This constitutes an overpayment of \$1,206.25.

K.S.A. 2000 Furse 44-510e(a) states:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director

pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:

(1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66 2/3% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto; (2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and (3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

The Board must next determine the extent of claimant's injuries and disability. Claimant alleged extensive injuries from his head to his right foot, with a multitude of body parts in between. However, the initial complaints were limited to claimant's right upper extremity, right shoulder and neck. The accident report prepared by claimant listed only the right arm and shoulder. The initial treatment was limited to his right upper extremity, and specifically, the shoulder. Claimant's myriad of complaints did not appear until after December 23, 2009. The Board finds claimant's accident of November 17, 2009, resulted in injuries to claimant's right upper extremity at the shoulder, only. Additional alleged injuries are not supported by this record. Additional bodily injuries claimed require the Board accept claimant's testimony. However, claimant was shown in this record to lack credibility with regard to the numerous allegations of physical injuries and limitations.

The ALJ awarded claimant an 18 percent permanent partial functional impairment to the right shoulder. This is the only body part which would justify any permanent impairment, based upon this record. The Board agrees with the determination of the ALJ and awards claimant an 18 percent functional impairment at the level of the right shoulder. The Award is modified to find claimant's average gross weekly wage is \$40.40 and affirmed with regard to whether claimant suffered personal injury by accident on November 17, 2009, which arose out of and in the course of his employment with respondent. Additionally, the award of an 18 percent permanent partial functional impairment to the right shoulder is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to find claimant's average gross weekly wage to be \$40.40, but affirmed in all other regards.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated April 15, 2013, is modified to find claimant had an average gross weekly wage of \$40.40, but affirmed with regard to whether claimant suffered personal injury by accident which arose out of and in the course of his employment with respondent, with a date of accident on November 17, 2009, and that claimant suffered an 18 percent permanent partial functional impairment to his right shoulder from that accident.

Claimant is entitled to 5.68 weeks of TTD at the compensation rate of \$26.93 per week, totaling \$152.96, followed by 39.48 weeks of permanent partial functional disability at the rate of \$26.93 per week, totaling \$1,063.20, for a total award of \$1,216.16, all of which is due and owing and ordered paid in one lump sum, minus any amounts previously paid. Any overpayment from respondent may be presented to the office of the Director of Workers Compensation for appropriate reimbursement from the Kansas Workers Compensation Fund. In all other regards the Award is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENTING OPINION

The undersigned Board Member respectfully dissents from the majority ruling that claimant suffers a permanent shoulder impairment as a result of his alleged work-related accident. The ALJ awarded claimant an 18 percent permanent partial impairment to the shoulder by the “narrowest of margins.” While he acknowledged that Dr. Stein, the court appointed examining physician, was unable to assess an impairment due to claimant’s invalid examination findings, the ALJ disregards Dr. Stein’s opinions. More weight should be given to Dr. Stein’s opinions. Dr. Stein’s opinions, coupled with the opinions of Dr. Moeller, support a conclusion that claimant suffers no permanent impairment as a result of his alleged injuries. No award for permanent disability of any kind, should be awarded in this case.

BOARD MEMBER

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